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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. [redacted] 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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The petition for writ of certiorari presents two questions for the consideration of this Honorable

Court. The first question is framed in terms of "exemption" from the Sherman Act. The second attempts to probe the distinction between public and private injury flowing from asserted violations of anti-trust laws. Neither question receives specific treatment in the argument of petitioner. Inasmuch as the problems posed are generally embraced within the topical divisions of petitioner's argument, the brief in opposition will not consider the questions as such but will follow the numbering and subject division employed by petitioner in setting forth his "Reasons for Granting the Writ".

I.

EXEMPTION OF PROFESSIONAL FOOTBALL FROM ANTI-TRUST LAWS.

The petitioner apparently interprets the decision of the United States Court of Appeals for the Ninth Circuit as a determination that the sport of Professional Football is not subject to the provisions of the Anti-Trust laws by reason of certain conduct of Congress which implies an intention to exempt such sport. We do not believe the decision to be susceptible of such limitation. The result below is grounded upon and consistent with previous decisions of this and other Courts. It is obvious that the reference to Congressional indulgence found in the opinion is not the basis for the decision but has been added, as the terminology suggests, as a "further" persuasive fact.

The Court of Appeals for the Ninth Circuit has given consideration to the impact of the Anti-Trust

laws upon professional sport, has analyzed the principal decisions in this field of law and has determined that the facts of this case bring it within the rulings made relative to professional baseball. The determination is a well considered one. The proceedings below, as the opinion indicates were concerned in large measure with a comparative analysis of the *Federal Baseball* case (*Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898; Court of Appeals decision 269 F. 681), the *Toolson* case (*Toolson v. New York Yankees*, 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64), and the *International Boxing* case (*United States v. International Boxing Club of New York*, 348 U.S. 222, 75 S. Ct. 277, 99 L. Ed. 279). From such analysis it was decided that the *Baseball* cases were controlling, the Court stating:

> "If our first step is correct: that we have the right to compare, then the second one is obvious. Football is a team sport. *Its operation has just about the same aspects as baseball.* Boxing is an individual sport. *In professional football, very good arguments do exist for the indulgence of restraints on individual players.* Of course such indulgence could not stand against the positive commands of the Congress. In boxing, arguments for restraints on the individual's right to contract seem rather hollow." (Emphasis ours.)

The Court below is aware that baseball has had a full day in Court and that every facet of its pattern and operation has been considered in the judicial proceedings which resulted in the baseball decisions.

Should petitioner be of the belief that baseball was the beneficiary of judicial fiat which "exempted" the sport without good cause let it be pointed out that the Federal Baseball decision evolved from a protracted trial in the District Court. The expression "organized baseball" employed by the Court of Appeals and the Supreme Court in the *Federal Baseball* case is the synthesis of a voluminous record of testimony and documentary evidence. "Organized baseball" connotes the whole framework and the complete *modus operandi* of the business of baseball as disclosed by the record of the District Court. And no detail was omitted in the evidence presented to the lower Court. Upon appeal from a decision adverse to "organized baseball" the Court of Appeals (269 F. 681, 687) held:

> "Generally speaking, every player was required to contract with his club that he would serve it for one year, and would enter into a new contract 'for the succeeding season at a salary to be determined by the parties to such contract'. The quoted part is spoken of as the 'reserve clause', and it is found, in effect, in the contracts of the minor league players as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of 'contract-jumping', he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues.

The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the ranks of the latter for many of its players. If the reserve clause did not exist, the highly skilled players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests

> the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute."

The language above quoted from the decision of the Court of Appeals of the District of Columbia was before the Supreme Court when writ of error issued to the lower Court. In the opinion of Mr. Justice Holmes is found *inter alia:*

> "The decision of the court of appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of plaintiff's recovery."

It appears clear that Mr. Justice Holmes regarded the business of giving exhibitions of baseball as "purely state affairs" and also decided that such exhibitions "would not be called trade or commerce in the commonly accepted use of those words." But it is equally clear that the whole pattern of organized baseball was patent to the Supreme Court when the *Federal Baseball* case was decided. The decision is not a summary dismissal of the subject.

There is not one charge made against professional football by the complaint before us that cannot be found as a proven fact in the record of the *Federal Baseball* case. The composition and *modus operandi* of professional football are identical with those of

"organized baseball". The garment was cut from the same pattern and by many of the same hands. With complete justification does the Court below in the instant matter conclude:

> "Its operation has just about the same aspects as baseball."

Baseball and football are each competitive team sports dependent for popular acceptance upon a well rounded schedule of exhibitions among teams of comparable strength. In order to provide a balanced program of events each sport is organized upon a league basis. Major league baseball consists of the National League and the American League, each comprised of eight teams, which maintain intraleague schedules during a regular season. The championship teams of both leagues meet in the World Series to determine the world championship. Football is similarly organized into leagues. Major calibre football is embraced within the framework of the National Football League and its constituent Western Conference and Eastern Conference, each comprised of six teams. A regular season intra-conference schedule determines divisional champions who meet in a World's Championship game.

Each sport is presided over by a commissioner who is delegated regulatory and disciplinary power.

Each sport is subject to governing agreements providing organization and regulating operation. In baseball these provisions are found in the organic rules of the National League of Professional Baseball Clubs

and of the American League of Professional Baseball Clubs and in the Major-Minor League agreement. The rules governing professional football are found in the constitution and by-laws of the National Football League, an unincorporated association.

The governing canons of each sport prescribe generally and in common:

(a) That a uniform player's contract shall be employed by all teams.

(b) That such contract shall provide, for the benefit of the club, an option to renew the agreement respecting the services of a player.

(c) That a player may only perform for the team with whom he is under contract or to which such contract is assigned.

(d) Violation of a contract or of the clause which "reserves" the player to a team will result in the suspension of a player.

(e) Ineligible players may be reinstated only by ruling of the Commissioner.

It is these underlying agreements and particularly the "reserve clause" provisions thereof which have been the gravamen of all of the complaints filed against both baseball and football to challenge the status of such sports under the anti-trust statutes.

The nature, history and purpose of the "reserve clause" are before the Courts in the Baseball cases, both old and new, and in the record below. They were fully understood by the Honorable Court of Appeals

for the Ninth Circuit when it recognized the similarity between baseball and football and stated in the decision here under consideration:

> "In professional football, very good arguments do exist for the indulgence of restraints on individual players."

The propriety of the courts' determination needs little review. It is obvious to the patrons of the sports that the so-called "reserve clause" is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is an insurance against the bestowal of "favors" upon an opponent team with whom the player may desire future affiliation.

Baseball had originally attempted to operate without the benefit of a "reserve clause" and the attempt was disastrous. All of the outstanding talent became concentrated in one or two teams, resulting in unequal contests which discouraged patronage and caused financial loss. The Court of Appeals in the *Federal Baseball* case was thoroughly apprised of the situation when it stated:

> "If the reserve clause did not exist, the highly skillful players would be absorbed by the more

> wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them." (269 F. 681, 687.)

This Honorable Court through Chief Justice Warren in *United States v. Shubert,* 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279, has indicated to us the opinion of the Court that the baseball cases may be read as "specifically fixing the status of the baseball business under the anti-trust laws *and more particularly the validity of the so-called 'reserve clause'* ". (Emphasis ours.)

The later baseball cases, *Toolson v. New York Yankees,* 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64, and *Kowalski v. Chandler* and *Corbett v. Chandler,* decided as companion cases with *Toolson,* confirm the identical pattern of the two sports. Although these cases came to the higher Courts after dismissals below and consequently have not the voluminous record of testimony found in *Federal Baseball,* each offers a complaint setting forth the very charges which are here under consideration with respect to football. The complaints in *Toolson, Corbett* and *Kowalski* are interchangeable with that of Radovich.

We set forth for comparative analysis the charging paragraphs of the Toolson and Radovich complaints.

Toolson.

"XI

"That the defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:

1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.

2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the players' contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.

3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of

Radovich.

"13

"The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:

(a) That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League.

(b) That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

(c) That defendants agree that any player violating the reserve clause will be black-

Toolson.

his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

5. That there shall be no negotiations between a player and any other club from the one to which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

Radovich.

listed by all clubs in the National League so that no club in the said National League may hire him."

It is inconceivable that a decision upon the basis of the facts set forth in the Toolson complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

The Court below in the instant matter was also aware that the "reserve clause" of football which was under consideration was a mollified version of that which baseball had presented for judicial scrutiny. The uniform contract employed by the National Football League grants to the club merely the right to a one year extension of the current contract. Such provision can scarcely be classified as unreasonable nor constitute a basis for the ludicrous label "peonage" which less adequately compensated members of the legal profession affix to player-club relations.

Petitioner places emphasis upon *U. S. v. International Boxing Club of N. Y.*, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290. There is no parity between the sports of boxing and football, in organization or operation. The player control required in the team sports of football and baseball which is essential to maintain team balance and cohesion and to thus insure competition between teams of comparable strength finds no application in the sport of boxing (if indeed boxing may be called a sport). The complaint in boxing indicates nothing but an attempt to eliminate competition. There is absolutely no justification for an arrangement which places all contenders for the heavyweight boxing championship under contract to one promoter. Clearly, football conforms to the pattern of organized baseball and not to the heteronomous business of boxing.

However the members of this Honorable Court may have differed with Mr. Justice Frankfurter in the application of the rule of logic expressed in his opinion

in the *International Boxing Club* case, all must agree with the soundness of such statement:

> "Since, in the light of all the circumstances, Federal Baseball was left undisturbed by Toolson, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the Federal Baseball case should be covered by it. I cannot translate even the narrowest conception of statae decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it."

In football we have a sport which is veritably "different not one legal jot or tittle" from baseball. Reason impels the application of the baseball decisions.

II.

PUBLIC INJURY AS A NEW CONCEPT.

In the opinion of the Court of Appeals herein is found the following:

> "While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendancy or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

Petitioner would have us believe that the element of public injury is a novel concept and a departure

from "accepted tradition". It is contended that the requirement of public injury is a new doctrine which the Ninth and Tenth Circuits have seized upon. The position of petitioner disregards the basic purpose of the anti-trust legislation, opinions of this Honorable Court and opinions of various circuits additionally of the Ninth and Tenth Circuits.

Reflections upon the legislative history of the Sherman and Clayton Acts reminds us that Congress had not the intention of creating a mode of redress for private injury occasioned by combination or conspiracy. The legislative intent as interpreted by Chief Justice White as early as 1915, in *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165, 35 S.Ct. 398 is as follows:

> "In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided were coextensive with such conceptions."

In *Appalachian Coals Inc. v. United States*, 288 U.S. 344, 360, this Court said, citing a long line of cases:

> "The decisions establish, said this Court in Nash v. United States, 229 U.S. 373, 376, 57 L.Ed. 1232, 1235, 33 S.Ct. 780, 'that only such contracts and combinations are within the act as, by reason

of intent or the inherent nature of the contemplated acts, *prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.*"

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500, this Court stated:

> "Labor cases apart, which will presumably be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition.*"

The private statutory claim or right of action to recover treble the damages proximately caused by a violation of the Sherman Act was created to induce private persons to aid in the enforcement of that Act. The private right of action is incidental and subordinate to the protection of the public.

The rule is concisely set forth in *Abouaf v. J. D. & A. B. Spreckels Co.* (N.D. Calif.), 26 Fed. Supp. 830, 832:

> "The main purpose of the Anti-Trust Acts was to provide protection for the public from monopolies and restraint of trade; and the individual right of action was incidental and subordinate. A complaint to state a cause of action must show not only damages sustained by the individual plaintiff, but even more importantly, a violation of public rights prohibited by the Act."

The opinion of the Court below in the *Radovich* case cites *Fedderson Motor Co. v. Ward* (10th Cir. 1950),

180 F. (2d) 519, in support of its statement relative to the requirement of public injury. The *Fedderson* decision had stated (180 F. (2d) 519, 522):

> "Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest."

If we correctly interpret the petition of Mr. Radovich it is the contention of petitioner that the foregoing quotation from *Fedderson* is a fiction of the 10th Circuit (concurred in by the 9th Circuit) and predicated upon a misinterpretation of *Shotkin v. General Electric Co.* (10th Circuit 1948), 171 F. (2d) 236, which is in turn predicated upon an overstatement of *Glenn Coal v. Dickinson Fuel* (4th Circuit 1934), 72 F. (2d) 885. May we attempt to unravel this bit of dialectics in inverse order.

Petitioner has quoted from the opinion of the 4th Circuit in *Glenn Coal v. Dickinson.* A more apposite selection would have been the following:

> "Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action at common law."
>
> *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, 889.

Petitioner might also with more relevancy have substituted for the portion of *Shotkin v. General Electric Co.* quoted by him, the following excerpt from such case:

> "Injury to plaintiff of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination or concert."
>
> *Shotkin v. General Electric,* 171 F. (2d) 236, 239.

It is obvious from the two quotations above set forth that *Fedderson* is no more extensive than the decisions which preceded it. Nor is it contrary to the case of *City of Atlanta v. Chattanooga Pipe and Foundry* (6th Cir. 1903), 127 Fed. 23, as petitioner contends. The public injury in such case had already been established in proceedings instituted by the United States against the pipe trust, which proceedings resulted in a decree dissolving the trust. In fact so obvious was the public nature of the injury that the public corporation, the City of Atlanta, had a difficult time in convincing the Court that it was a private person entitled to maintain a treble damage action.

Petitioner cites *Roseland v. Phister* (C.C.A. 7th Cir. 1942), 125 F. (2d) 417 as a private action case germane to this discussion. Unquestionably it is a private action case which determined that a sales agent of one of the offending combine could recover under the treble damage provisions. The element of public

injury is not discussed but is certainly present in that there appears the fact that the Federal Trade Commission had upon complaint obtained a consent cease and desist order.

Petitioner further cites *National Used Car Market Report Inc. v. National Automobile Dealers Assn.* (D.C. Circ. 1952), 200 F. (2d) 359 as a decision contrary to the public injury doctrine. We submit that the decision does not have such import. It rather recognizes the doctrine and turns upon the question of the adequacy of the allegations to satisfy the requirement. The Court concludes:

> "We think it might be determined as a matter of law that the broad trade boycott here alleged is reasonably calculated to prejudice the public interest."

The added thought ". . . . we think it is not necessary to make specific allegations or proof of public injury in order to show that a trade boycott of such breadth violates the Sherman Act" does not negate the finding of a sufficient allegation of public injury. Nor is such statement tantamount to a declaration that public injury need not be ascertainable from the complaint.

The remaining cases cited by petitioner under this subject heading do not contribute to this discussion. The portion quoted from *Wheeler-Stenzel Co. v. National Window Glass Jobbers Assn,* 152 Fed. 864 is so out of context as to be meaningless. It can only be read in conjunction with the dissertation upon the private consequences of public wrong, which preceded it. It was therein unsuccessfully contended that in

addition to a violation of the anti-trust statute there must be some common-law tort or breach of contract resulting from the public offense in order that a party injured might recover three-fold damages. The contention is disposed of by a quotation from Bishop on Non-Contract Law:

> "Whenever the law, a statute, a municipal by-law, or any other law, imposes on one a duty if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable and a civil action will lie in favor of any person who has suffered especially therefrom."

Then follows the language quoted in the Radovich petition. It is certainly no holding that public injury is not to be considered.

The case of *Albert Pick-Barth Co. v. Mitchell Woodbury Corporation,* 57 F. (2d) 96, (C.C.A. 1st Circ.) is something less than a legal landmark if the number of times which it has been cited would be a criterion. The decision was made after a jury trial and seems to be resolved by a patent intent to restrain interstate trade. On the same page where appears the quotation culled by petitioner the Court determines that the proof of a conspiracy to suppress competition is a violation of the Sherman Act, and further determines that a price fixing combination regardless of result is an unreasonable restraint of trade *"because it restricts competition to which the public is entitled"*. The Court is not as unmindful of the public interest as it would profess by the language found in the Radovich petition.

The case of *Monarch Tobacco Works v. American Tobacco Co.*, 165 F. 774 has been cited by petitioner and briefly quoted. The language used is part of a general preface discussion of the Sherman Act which has no part in the decision of the case. The case merely holds that an inchoate conspiracy is a violation of the act since the statute prohibits an "attempt" to monopolize.

The 2nd Circuit decision in *Gardella v. Chandler*, 172 F. (2d) 402 serves no purpose in this discussion other than to review for us the language which prompted petitioner to file below with an assurance that Federal Baseball would be overturned upon the first opportunity afforded the Supreme Court. The complete divergence of the three opinions and the subsequent action of this Court in the Toolson matter leave the *Gardella* case with little standing.

In summation of this topic we respectfully submit that no conflict exists among the various circuits which would require review of this Honorable Court. The requirement of a public injury has been a determination of the Supreme Court and has been consistently imposed by the Courts regardless of circuit. Indicative and declarative is the language of the 3rd Circuit Court of Appeals in *Hunt v. Crumboch*, 143 F. (2d) 902:

> "Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise

prices or otherwise control the market in goods or services to the detriment of the public."

III.

INHERENT PUBLIC INJURY.

By attempt to argue an "inherent" public injury from the facts alleged in the complaint, petitioner concedes the cogency of our position that the element of public injury is an essential one. This more realistic approach affords us an opportunity to analyze the opinion of the Court below as a decision upon the facts alleged in the complaint rather than as an abstract legal treatise.

At the outset it must be recognized that the Court was as vigilant as petitioner in search for "inherent" public injury. Despite the implication of the petition the Court of Appeals did not insist upon a specific allegation of public injury. Even the *Fedderson* case which disturbs petitioner, merely requires "that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendancy *or the inherent nature* of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." The Court below applied the inherent nature norm and concluded:

> "Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause and its enforcement is legally sufficient to support, without more, a conclusion that

these means were calculated to prejudice the public or unreasonably restrain interstate commerce."

Petitioner sets forth the four principal allegations of the complaint and makes contention that the facts alleged are violations of the anti-trust laws which have inherent adverse effect upon the public. We review the allegations:

"(1) Respondents attempted by unlawful combination and contract to control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States."

In his consideration of this allegation petitioner cites various cases involving general business associations, trusts and monopolies. He concludes that no difference exists in the application of anti-trust principles to a sport or to any other type of business. The Courts have held to the contrary. The Baseball cases are controlling upon this point.

"(2) Respondents adopted uniform players' contracts containing reserve clauses, published by the National League."

Petitioner argues that the uniform adoption of industry regulatory contracts are in violation of the anti-trust laws. We deny the parity. There is a cognizable difference between the staging of sporting events and operation in the general world of business. In sport, competition between teams must be *stimulated* in order to reflect profit to the club owners. In business the *elimination* of competition results in profit. Obviously, therefore, the restraints employed in the one field

differ wholly in type and object from the restraints employed in the other.

The nature, history and purpose of uniform contracts and reserve clauses in the field of professional sports have been thoroughly considered by the Courts and have been found to be not in violation of the anti-trust laws.

From this allegation petitioner also infers an "inherent economic effect" in decreased player salaries. Such inference is confuted by the very allegations of the complaint. Other allegations tell us that the reserve clause in effect among the National Football League Clubs prevented his employment by other teams in such league and forced him to take employment in the rival All America Conference at twice the salary he had been receiving in the National League. The transcript of record also discloses that employment was available to petitioner as a professional football player in the Canadian Football League, a wholly independent association. The record further indicates that petitioner took advantage of such employment and played in the Canadian League during the years 1948 and 1949, the very period during which he was allegedly foreclosed from his profession.

The further conclusion of petitioner that the player controls prevent competitive clubs from obtaining needed talent is preposterous. The very purpose of the regulations is to assure an equal distribution of player talent.

As part of his analysis of his allegation (2) petitioner alludes to the "then competing All-America

Conference" and states that "since said time this Conference has been merged with respondents". The demise of the All-American Conference is not within the allegations of the complaint and should have no part in this discussion. Lest, however, it should be inferred that the complained of conduct of respondents effected by merger the elimination of a competing league may it be pointed out that no merger did in fact result. The All-America Conference withdrew from the field because it was unable to survive financially in open and unbridled competition with the National Football League. It was not the failure to obtain players which foretold its collapse but rather the competition for public patronage. Upon the dissolution of the All-America Conference two of its member clubs made application for admission to the National Football League and were accepted. There was no merger of the leagues.

"(3) That the respondents uniformly blacklist players who violated the reserve clause."

In the complaint of Toolson appears the same allegation, in language as follows:

"that the Defendant, George M. Troutman, placed plaintiff on the ineligible list of the Binghamton Exhibition Company, Inc., on the 25th day of May, 1950; that Plaintiff has been held and is still held on such ineligible list at this time".

The citation of *Fashion Originators Guild v. Federal Trade Commission,* 114 F. (2d) 80 is not in point. The *Toolson* case is a specific decision upon this precise fact.

"(4). That the respondents forced petitioner to sign a reserve clause restraining his playing football for anyone else but one club for life and in effect throughout the United States and boycotted him on its violation."

In the interests of accuracy it should be recorded that the reserve clause provisions under scrutiny are the following:

"The Player will not play football during 1945 otherwise than for the Club . . .

"Any time prior to August 1, 1946 by written notice to the Player, the Club may renew this contract for the term of that year . . ."

Even though we do not believe that the facts support the allegation we will address our comments to the allegation. In its broadest comprehension the allegation is not a novel one. It was before the Courts as part of the baseball pattern and was found unobjectionable. *Federal Baseball* (269 F. 681, 687) viewed the same facts and commented:

"The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts . . . in other words these things had the intended effect, viz. of preventing players from disregarding their obligations."

Apparently the Court saw a public benefit flowing from the restraints rather than a public injury.

The general import of the listing of such allegation as embodying an inherent public injury would seem to be that the treatment of Radovich is a matter of public

concern. The argument relies upon the common law concept that provisions restricting one from the practice of his trade were void as against public policy. Such concept is something other than the public injury flowing from a restraint upon interstate commerce which the decisions require as a prerequisite to a suit by a private person for treble damages under the anti-trust laws. Furthermore an infringement of such public policy, would not be a public injury of a type which would affect prices, diminish the free flow of goods or bring about a deterioration in the quality of goods or services furnished to the public. The elimination of Radovich from the lineup of the National Football League, from the standpoint of the public would be immaterial if there were others to replace him in the program.

In *Hunt v. Crumboch* (C.C.A. 3rd Circ.), 143 F. (2d) 902 (affirmed by the Supreme Court upon a different issue) the point is covered:

> "We must assume, for nothing to the contrary appears in the plaintiff's case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public however, it is immaterial whether the plaintiffs or others provide the services."

The principle of law is stated thusly in *Conference of Studio Unions v. Loews, Inc.*, 193 F. (2d) 51:

> "... in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed *which harms him.* He must show that he is *within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.* Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> "Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and *withheld from those who seek the windfall of treble damages because of incidental harm.*" (Emphasis ours.)

That allegation (4) does not embody inherent public injury is attested by statutes and decisions in the field of personal service contracts involving special and unique talent. In the home state of petitioner, California, statutes make provision for injunction against the breach of a contract for the rendition of such service when the stipulated compensation is not less than $6,000 per annum (California Code of Civil Procedure §526; Civil Code §3423). The Labor Code of such state by §2855 also permits the enforcement of a contract for special services, *for a term of not to exceed seven years.* A one year contract with an op-

tion of renewal for an additional year obviously offends no public policy of that state. Courts of Equity in the cases of *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. (D.C.) 269, and *Philadelphia Ball Club Ltd. v. Lajoie*, 202 Pa. 210, 51 Atl. 973, found no compelling public policy intervening when enforcing the negative covenants of similar baseball contracts. In short, legislatures and Courts of Equity have declared the public policy and interest in favor of the enforcement of this type of agreement, and the "reserve clause" which is set before us with a one year term and a one year option is well within the limitations prescribed by statute and decision.

The argument of petitioner is open to further attack in that there is no causal connection between any injury to the petitioner, (whether inherently of public concern or of mere private concern) and any alleged act which constituted a violation of the anti-trust laws. The allegations fail to suggest, much less affirmatively show, that the player regulations had a substantial or indeed any effect upon interstate trade or commerce. It is certain that they were not intended to affect interstate trade or commerce. Their object was to maintain a team balance in player talent and thus furnish the best competition possible. Interstate communication and travel, stressed at length in the complaint are certainly incidental to the playing of football games, but the aggrieving player regulations in no manner affected such interstate incidents of the sport. In short, the petitioner was not injured "by reason of anything forbidden or declared to be unlawful by this act."

We respectfully urge that the decision of the Honorable Court of Appeals for the Ninth Circuit is a correct disposition of the matter and that no cause exists for the granting of a writ of certiorari.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,

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